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Comprehensive dialogue with United Nations agencies and funds

Review of World Bank operational policies

Note by the secretariat

Pursuant to a decision of the Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 102), Eva Biaudet,[1] a member of the Forum, was appointed to undertake a review of World Bank operational policies, analyse participation mechanisms on indigenous peoples and determine to what extent those policies respect the United Nations Declaration on the Rights of Indigenous Peoples, which is hereby submitted to the Forum at its twelfth session.

I. Introduction

1. The purpose of the present study is to review the World Bank Operational Policy on Indigenous Peoples (OP 4.10, Indigenous Peoples Policy) and Bank practices in the light of the standards outlined in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). Undeniably, the Bank's development activities have significant impacts on the rights and livelihoods of indigenous peoples, who worldwide constitute the "poorest of the poor and continue to suffer from higher rates of poverty, lower levels of education and a greater incidence of disease and discrimination than other groups".[2] The Permanent Forum

* E/C.19/2013/1.

[1] The author would like to thank the Special Rapporteur on the rights of indigenous peoples, James Anaya, Mattias Åhrén and Permanent Forum member Dalee Sambo Dorough for their comments and suggestions. Navin K. Rai, the World Bank Adviser on Indigenous Peoples from 2000-2012, provided clarifications on the Bank's current Indigenous Peoples Policy (OP 4.10). The author also acknowledges Tove Holmström for her assistance with the present report.

[2] World Bank study Indigenous Peoples, Poverty and Development (2010) offers a "global snapshot" of a set of indicators for indigenous peoples vis-a-vis national demographic averages. The study states that as the global community looks for ways to meet the Millennium Development Goal of halving the share of people in poverty by 2015 from its 1990 level, it cannot afford to ignore the plight of indigenous peoples. Although they make up only 4.4 per

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on Indigenous Issues,[3] indigenous peoples[4] and civil society organizations[5] have urged the Bank to review its policies and to bring them into line with legal standards arising from international human rights law as outlined in the Declaration.

2. The World Bank recently began a process of reviewing and reforming its Environmental and Social Safeguard Policies,[6] which embrace the Bank's do-no-harm approach. These policies, which include the Indigenous Peoples Policy, are meant to provide critical protection for indigenous peoples and others affected by Bank-financed projects. None of the safeguard policies have yet been revised to reflect the articles set out in the Declaration. At the same time, the policy review process presents a unique opportunity to ensure that the Bank's policies and practices meet the standards of the Declaration. Avoiding harm to communities affected by Bank activities and other development and climate finance institutions that have adopted the Bank's safeguards[7] is a baseline from which further steps

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cent of the global population, indigenous peoples account for about 10 per cent of the poor, with nearly 80 per cent of them in Asia.

[3] See E/2012/43-E/C.19/2012/13, para. 40 available from http://social.un.org/index/IndigenousPeoples/UNPFIISessions/Eleventh.aspx. and E/2009/43-E/C.19/2009/14, para. 6, available from http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_14_en.pdf.

[4] See Joint Letter from Indigenous Peoples to Jim Yong Kim, President of World Bank (19 September 2012), p. 2 (on file with author); Statement by Indigenous Peoples of Abya Yala calling upon the World Bank to update its Indigenous Peoples Policy in the light of the United Nations Declaration on the Rights of Indigenous Peoples (24 August 2012), available from http://bit.ly/VQMfmT; Joint Letter from Indigenous Peoples to Jim Yong Kim, incoming President of World Bank (23 June 2012), p. 2 (on file with author); Joint Letter from Indigenous Peoples to Robert Zoellick, former President of World Bank (17 Oct. 2011), p. 1 (on file with author); Indigenous Peoples' Opening Statement at High-level Direct Dialogue between Indigenous Peoples and the World Bank (15 Nov. 2010), available from http://bit.ly/WRw6vf; Report by Unissons-nous Pour La Promotion Des Batwa and Indigenous Peoples of Africa Coordinating Committee on the Dialogue between the World Bank and the Indigenous Peoples in Central and East Africa on the Forest Carbon Partnership Facility: Consultations on Activities Aiming at Reducing Emission due to Deforestation and Land Degradation (13 Mar. 2008), available from http://wbcarbonfinance.org/docs/Africa_IPACC_Report__FCPF_IP_Consultation.pdf.

[5] See, Joint Comments by Civil Society Organizations on the World Bank Safeguards Review (10 Oct. 2012), p. 7 (on file with author); Open Letter from Civil Society Organizations to future President of World Bank (9 Apr. 2012), available from http://www.bicusa.org/en/Article.12616.aspx; Joint Letter from Civil Society Organizations to Robert Zoellick, former President of World Bank (31 Aug. 2011), p. 1 (on file with author); Forest Peoples Programme, Submission to Independent Evaluation Group Regarding the World Bank Group Safeguard and Sustainability Frameworks (June 2010), available from http://www.forestpeoples.org/sites/fpp/files/publication/2012/09/fpp-ieg-submission-june-final.pdf; Report by International Forum for Globalization and Tebtebba Foundation on Strategy Session: Implementing the United Nations Declaration on the Rights of Indigenous Peoples (27-28 Oct. 2008), p. 15 and 22, available from http://www.ifg.org/pdf/UNDRIP%20Report-English.pdf.

[6] The World Bank's Safeguard Policies: Proposed Review and Update Approach Paper (10 Oct. 2012), available from http://siteresources.worldbank.org/EXTSAFEPOL/Resources/584434-1306431390058/SafeguardsReviewApproachPaper.pdf.

[7] For example, Bank safeguards serve as the default floor for United Nations agencies and regional development banks implementing climate programmes under the Forest Carbon Partnership Facility. See Forest Carbon Partnership Facility, Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners, available from http://www.forestcarbonpartnership.org/fcp/node/301.

must be taken towards a more inclusive human rights perspective in all its actions. States, intergovernmental organizations and a wide range of international actors, including business enterprises, are in the process of identifying ways and means to advance respect for and recognition of human rights in all their activities.

3. The present report highlights some areas of concern relating to the World Bank's approach to indigenous peoples in the light of the Declaration standards and recent developments within the international human rights system. It focuses on a limited number of critical substantive and procedural rights embraced by the Declaration, such as indigenous peoples' ownership of their lands, territories and natural resources, from which standards such as free, prior and informed consent and benefit-sharing arise. The author focuses on a few important matters that are being raised by indigenous peoples, civil society organizations, United Nations mechanisms and experts.

4. The report may also contribute to furthering the World Bank's cooperation with the Permanent Forum and with indigenous peoples in fulfilling its mandate to promote long-term economic development and poverty reduction. Following a recommendation made by the Permanent Forum at its eleventh session in 2012 (see E/2012/43-E/C.19/2012/13 para. 119), the Bank was invited to engage with the Forum in a half-day in-depth session, scheduled to be held at the Forum's twelfth session in May 2013.

5. Section II of the report addresses the need for a human rights-based approach to implement the Declaration in development activities. Section III provides a brief analysis of the World Bank Indigenous Peoples Policy in the light of the Declaration standards on indigenous peoples' right to lands, territories and natural resources; and benefit-sharing. Section IV considers free, prior and informed consent. Section V examines participation mechanisms and considers indigenous peoples' participation in the Bank's policy development and project-related activities. Based on identified gaps, section VI lists some recommendations.

II. Implementing the United Nations Declaration on the Rights of Indigenous Peoples: embracing a human rights-based approach to development activities

6. The Declaration is the most authoritative expression of the "existing international consensus regarding the individual and collective rights of indigenous peoples"[8] and "provides a framework of action for the full protection and implementation of these rights".[8] It provides a normative framework for engagement between indigenous peoples and States, the private sector and the United Nations system.

7. Furthermore, articles 41, 42 and 43 of the Declaration provide guidance to all United Nations bodies and specialized agencies, including the World Bank, emphasizing the duty to contribute to the full realization of and to promote respect for and full application of the provisions of the Declaration and the minimum standards for the survival, dignity and well-being of indigenous peoples. The

[8] See Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/66/288, para. 69.

Declaration should serve as the basis and framework for any revisions made in the World Bank Indigenous Peoples Policy as well as all other existing and emerging safeguard policies in favour of indigenous peoples.[9]

8. Implementing the Declaration in development activities involves embracing a human rights-based approach to development. Human rights standards are widely recognized as vital components of development, since human rights violations in many cases are structural causes of poverty, be it through discrimination, lack of accountability and transparency, or abuse of State power.[10]

9. The human rights-based approach to development has been adopted by a growing number of development institutions. Particular attention should be given to the 2003 United Nations Common Understanding on Human Rights-Based Approaches to Development, Cooperation and Programming[11] and the 2008 United Nations Development Group Guidelines on Indigenous Peoples' Issues, which establish the policy and operational framework for implementing a human rights-based and culturally sensitive approach to development for and with indigenous peoples.[12] Along with the United Nations Development Group, many States' donor agencies[13] and the Organization for Economic Cooperation and Development (OECD)[10] have endorsed this approach.

10. Despite considerable endorsement of the human rights-based approach to development by the world community, the World Bank has been reluctant to embrace it. The Bank has not instituted any overarching operational policy on human rights, and "human rights concerns are not systematically incorporated into the everyday decision-making of the staff or consistently taken into consideration in lending".[14] It should be noted, however, that the marginality of human rights in the Bank's operations stands in contrast to official statements, including the 2006 "Legal Opinion on Human Rights and the Work of the World Bank" by former General Counsel, Roberto Dañino. The failure of internal attempts to institutionalize and operationalize a human rights agenda at the Bank have in large part resulted from bureaucratic obstacles, including internal conflict over how to interpret and implement human rights norms. In addition, the Bank's incentive system favours lending targets that can be measured quantitatively, rather than in terms of long-term

[9] Safeguard policies of relevance, aside from the Bank's Indigenous Peoples Policy (OP 4.10), include the Bank's Operational Policy on Involuntary Resettlement (OP 4.12), Forests (OP 4.36), Natural Habitats (OP 4.04) and Physical Cultural Resources (OP 4.11).

[10] See Development Assistance Committee of the Organization for Economic Cooperation and Development, DAC Action-Oriented Policy Paper on Human Rights and Development (2007), available from http://www.oecd.org/dataoecd/50/7/39350774.pdf.

[11] See http://hrbaportal.org/?page_id=2127 (last visited 9 November 2011).

[12] See http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf.

[13] See Swedish International Development Cooperation Agency, http://www.sida.se/English/Partners/Gamla-versioner/Sida-Partnership-Forum/Sida-Partnership-Forum1/Courses-2012/Courses-Autumn-2011/RBA112/ (last visited 28 Sept. 2012); British Department for International Development, http://www2.ohchr.org/english/issues/development/docs/human_rights_tsp.pdf; and Norwegian Agency for Development Cooperation, http://www.norad.no/en/tools-and-publications/publications/evaluations/publication?key=385467 (last visited 7 Nov. 2011).

[14] See Galit A. Sarfaty, "Why culture matters in international institutions: the marginality of human rights at the World Bank", *American Journal of International Law*, vol. 103 (2009), p. 648.

outcomes or compliance with the Bank's environmental and social safeguard policies.[15]

11. The author notes with appreciation that the World Bank has announced that it will consider human rights as an "emerging area" as part of its review process.[16] Assessment of human rights impacts and risks is critical for assuring development effectiveness and for preventing the violation of rights protected by the Declaration, and the Bank is encouraged to make human rights impact assessment a mandatory requirement for all Bank-financed activities. Such an initiative would be consistent with article 42 of the Declaration, which calls for not only the promotion of and respect for the full application of the Declaration but also for follow-up on its effectiveness.

III. World Bank and substantive rights

12. The Declaration provides for the protection of various substantive rights, which are meant to protect indigenous individuals and collectivities from discrimination (articles 2 and 21 (1)) or forced assimilation (article 8). In addition, the Declaration highlights the need for particular attention to be given to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities (articles 21 (2) and 22 (1)). The rights to self-determination (article 3), self-government (article 4), collective ownership of lands, territories and resources (article 26 (2)), development (article 23) and benefit-sharing all provide protection for indigenous peoples as distinct peoples within existing nation-States.

A. Ownership of lands, territories and resources

13. Customary land tenure is one of the specific features that characterize the large majority of indigenous peoples worldwide and is a fundamental feature of international recognition of indigenous peoples' rights.[17] Indigenous peoples have a distinctive spiritual relationship with their lands and related natural resources. Under international standards and practice, indigenous peoples have a "right to communal ownership of the land, territories and natural resources which they have traditionally used or occupied … in accordance with their culturally distinct patterns of use and occupation".[18]

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[15] For a discussion on the World Bank and human rights, see Galit A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford Studies in Human Rights) (Palo Alto, California, Stanford University Press, 2012).

[16] See The World Bank's Safeguard Policies: Proposed Review and Update Approach Paper (10 October 2012) para. 35 (Addressing emerging areas). Aside from human rights, the Bank has announced that it will also consider, inter alia, the free, prior and informed consent of indigenous peoples, land tenure and natural resources.

[17] See the Report of Special Rapporteur James Anaya, A/HRC/15/37, para. 57.

[18] Ibid., para. 54.

14. The Declaration recognizes indigenous peoples' right to own, use, develop and control their lands and territories and, as the Declaration makes clear, this right is also connected to the resources that lie on and within their traditional lands and territories.[19] Considering the World Bank's increased involvement in the extractive industries sector and that indigenous peoples' traditional lands and territories are often the site for development projects that take the form of large-scale exploitation of natural resources, the Bank is strongly urged to pay special attention to ensuring that indigenous peoples' land rights, including their right to the resources on and within their lands, are fully recognized and protected.

15. The protection of indigenous peoples' rights to ownership and use of their traditional lands, territories and resources is closely linked to the need to preserve their social, cultural and economic integrity. Without secure property rights, indigenous peoples' means of subsistence are severely threatened. Loss of land, territories and natural resources that indigenous peoples have traditionally owned, used or acquired and upon which they depend "results in deprivation of the basics required to sustain life and to maintain an adequate standard of living".[20] When indigenous peoples' rights to their lands, territories and natural resources are not recognized and respected, efforts to alleviate indigenous peoples' poverty and to achieve sustainable development are undermined, and indigenous communities will remain disadvantaged in the development process.

16. Identification and recognition of indigenous forms of ownership and use of land, territories and natural resources is a question of crucial importance "to the effective enjoyment of human rights by indigenous peoples" (see A/HRC/15/37, para. 53), and constitutes one of the core issues of the present report.

17. Indigenous peoples' right to their lands, territories and natural resources gives rise to the standard of free, prior and informed consent. Such consent is a requirement, and not merely an objective, whenever indigenous peoples' property rights are impacted by development projects and activities, and for projects located on, or that commercially develop, natural resources on lands or territories that indigenous peoples have traditionally owned or customarily used.

18. Indigenous peoples' right to benefit-sharing (discussed below) is a result of their property rights and follows from a process of free, prior and informed consent when their property rights are impacted. In development activities and processes that impact indigenous peoples' lands, territories and resources, the required benefit-sharing shall be the result of an agreement between the affected indigenous community and the agent proposing the project in question.

19. The Declaration recognizes indigenous peoples' ownership of and control over the lands, territories and natural resources under their possession, including both traditional lands and those that they have otherwise acquired (article 26). Numerous

[19] See article 26 (2) "Indigenous peoples have the right to own, use, develop and control the lands, territories and *resources* that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." (emphasis added).

[20] World Bank, Extractive Industries Review: Striking a Better Balance, Vol. I (2003) p. 40. Full report available from http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/$File/volume1english.pdf (last accessed in January 2013).

human rights bodies have affirmed the importance of this right in studies and decisions.[21]

20. Considering the Indigenous Peoples Policy in the light of article 26, it would seem that it falls short of requiring legal recognition of indigenous peoples' ownership of their lands, territories and natural resources as a governing requirement in World Bank-financed activities. Borrowers are required to secure the legal recognition of indigenous peoples' customarily used and occupied lands only where a project involves land titling or acquisition (see Indigenous Peoples Policy, para. 17). Thus, the policy sets a standard inconsistent with the Declaration, potentially allowing the Bank and borrowers to wholly disregard the matter of rightful ownership by indigenous peoples to their lands, territories and resources and their corresponding property rights to usufruct or use rights and/or to apportion communal lands to individuals (ibid.).

21. Under the Indigenous Peoples Policy, the requirement to secure the recognition of lands applies only to those lands that indigenous peoples traditionally owned or customarily used or occupied. The Policy remains silent about the situation of those lands that indigenous peoples have acquired by means other than traditional or customary occupation or use. In many situations, indigenous peoples have been illegally dispossessed of their traditional lands and now live and depend on lands that they have acquired by other means. Lands acquired by means other than traditional or customary occupation and use would also need to be protected in accordance with indigenous peoples' ownership rights as established in article 26(2) of the Declaration.

22. Furthermore, the current Indigenous Peoples Policy does not endorse the particular redress measure outlined in the Declaration regarding indigenous peoples' lands, territories and natural resources. In accordance with the Declaration, indigenous peoples are entitled to redress when development projects affect their lands, territories or resources (article 32(3)), which includes restitution and/or compensation for the lands, territories and resources that have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent (article 28(1)). More importantly, it establishes a particular redress measure under these situations, which shall take the form of lands, territories and resources equal in quality, size and legal status (article 28(2)). The Indigenous Peoples Policy does not require such redress measures and merely gives preference to land-based resettlement strategies that are compatible with indigenous peoples' and local

[21] *Sawhoyamaxa Indigenous Community versus Paraguay*, Inter-American Court of Human Rights, Series C No. 146, para. 222 (29 Mar. 2006) (finding that denial of land rights to the Sawhoyamaxa is detrimental to the community's values); *Yakye Axa Indigenous Community versus Paraguay*, Inter-American Court of Human Rights, Series C No. 125, paras. 157-58 (17 June 2005) (remarking that the right to live in ancestral territory flows from the right to life); *Mayagna (Sumo) Awas Tingni Community versus Nicaragua*, Inter-American Court of Human Rights, Series C No. 79, paras. 104 and 139 (31 Aug. 2001) (accepting the argument of the Inter-American Commission on Human Rights that the failure to adopt measures protecting the land and resources of the Awas Tingi violated its collective property rights). See also, In the Matter of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council versus the Republic of Kenya*, decision issued by the African Commission on Human and Peoples' Rights in May 2009, endorsed by the African Union on 4 February 2010.

communities' cultural preferences which are prepared in the Bank's consultation with them (see paragraph 20 of the Policy).

23. In a study on the implementation of the Indigenous Peoples Policy, recognition of land and resource rights scored the lowest of all compliance indicators measured.[22] The study found that "of most concern is the weak compliance regarding the protection or promotion of rights to lands and resources and the establishment of a grievance mechanism ... [w]hile recognizing the politically sensitive nature of indigenous peoples' rights in many countries, it is of particular concern that projects that affect land and water rights and could have had a positive impact on protecting or promoting the application of these rights, did not consider measures to address the land and resource rights which are often the condition sine qua non for the long-term well-being and sustainability of indigenous peoples' societies and cultures".[23]

24. The World Bank's Inspection Panel[24] has identified important instances of non-compliance with the Indigenous Peoples Policy, especially with regard to the right to security of land of the affected indigenous peoples. In September 2010, the Inspection Panel published its investigation report in response to a request brought by members of the Naso and the Ngäbe indigenous peoples in Panama.[25] The report illustrates the complexity and crucial importance of issues relating to indigenous peoples in the context of development projects and addresses fundamental and serious concerns relating to the Naso and Ngäbe peoples' land rights and security.

25. It should be noted however, that in the Naso and Ngäbe case, the Inspection Panel stated that "without diminishing the significant issues raised by several of its findings ... the Bank management has played a leadership role in engaging on the issues of seeking support to the land rights of indigenous peoples through this project".[26] The Inspection Panel also observed that, following the receipt of the request, "Bank staff engaged intensively and constructively with the complainants and affected communities to seek to better understand and help to resolve the problems they have raised".[26] While the requesters (the affected indigenous communities) had continuing fears about whether their rights would be supported, they greatly appreciated these actions by Bank Management, and hoped that the

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[22] Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008), Working Paper prepared for the World Bank Operations Policy and Country Services (August 2011) para. 46, available from http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf (hereinafter Operations Policy and Country Services Working Paper).

[23] Ibid., para. 81.

[24] The Inspection Panel is an independent complaints mechanism for people who believe that they have been, or are likely to be, harmed by a World Bank-funded project. The Inspection Panel determines whether the Bank is complying with its own operational policies and procedures and reports its findings to the Bank's Board of Executive Directors which, based on the findings of the Inspection Panel and responses from Bank Management, decides future actions. The Inspection Panel has received and investigated requests that have dealt specifically with indigenous peoples (such as the 2009 Panama Land Administration Project and the 2005 Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project, both of which are discussed in the present review).

[25] See Inspection Panel Investigation Report No. 56565-PA on the Panama Land Administration Project, available from http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Investigation_Report_full_September_16.pdf.

[26] Ibid., Overview, p. vi.

Bank would remain engaged on the issue of seeking support regarding the land rights of indigenous peoples in the country.

26. Notwithstanding the shortcomings in compliance with the Indigenous Peoples Policy, especially relating to indigenous peoples' rights and security to their lands, World Bank Management's positive efforts hold significance. In the case of the Naso and Ngäbe peoples, the Bank played an important role in seeking to support indigenous peoples' rights to their lands. The Bank is encouraged to continue supporting indigenous peoples' rights and security to their lands, territories and resources through direct and meaningful engagement on land rights issues in Member States and borrowing countries in cooperation with and with the participation of the indigenous peoples concerned.

B. Benefit-sharing

27. The concept that indigenous peoples should share in the benefits of any development that involves their lands, territories and resources is represented in the Declaration's recognition of indigenous peoples' ownership over their lands, territories and resources as well as rights to traditional knowledge (article 31). Benefit-sharing is not a stand-alone right, but is a result of indigenous peoples' property rights and the required free, prior and informed consent of the indigenous community if their lands, territories and resources are impacted by a proposed activity. When development projects are located or commercially developed on indigenous peoples' lands, territories and natural resources, the agent proposing the project should engage in consent processes with the affected indigenous community to reach an agreement that ensures that the community benefits from a project that is either carried out on or affects their lands, territories and resources.

28. The Indigenous Peoples Policy is designed to provide culturally appropriate benefits to the affected indigenous communities. The author appreciates the Indigenous Peoples Policy requirements relating to benefit-sharing, but also recognizes that there is room for improvement both in terms of policy and policy compliance, as discussed below.

29. The Indigenous Peoples Policy falls short of requiring that whenever indigenous peoples' lands, territories, natural or cultural resources are affected, benefits are to be shared equitably with them consistent with their ownership rights. The Policy provides for sharing of benefits in three situations: (a) commercial development of natural resources (see para. 18); (b) commercial development of indigenous peoples' knowledge or cultural resources (see para. 19); and (c) physical relocation and economic displacement owing to parks or protected areas created in indigenous lands (see para. 21). A noted concern is that as it currently stands, the Policy does not require that benefit-sharing agreements undergo third party review and verification.

30. A recent review of the implementation of the Indigenous Peoples Policy[27] noted that benefit-sharing/consent in commercial development of natural and cultural resources and benefit-sharing scored low.[28] Low compliance scores were

[27] Operations Policy and Country Services Working Paper.

[28] Ibid., para. 46.

also observed with respect to the criterion of agreement on benefit-sharing of indigenous peoples' knowledge.[29]

31. The World Bank is urged to require that whenever indigenous peoples' lands, territories and resources are affected, benefits be shared equitably with them consistent with their ownership rights and that benefit-sharing agreements undergo third-party review and verification.

IV. World Bank and procedural rights

Free, prior and informed consent

32. The Declaration establishes free, prior and informed consent of indigenous peoples as an essential standard that should govern all development projects affecting indigenous peoples' communities and environment.

33. The standard of free, prior and informed consent should not be regarded as a stand-alone right or an end in itself,[30] but rather as working as a crucial safeguard against any measures that may impact indigenous peoples' substantive rights, such as the right to property and non-discrimination in relation to lands, territories and natural resources. Free, prior and informed consent that applies specifically to indigenous peoples is justified by the generally marginalized nature of indigenous peoples in the political arena and is a means of effectuating their rights.[31]

34. The Special Rapporteur on the rights of indigenous peoples has proposed that the obligation to obtain consent should be a function of the potential impacts of a proposed measure on indigenous peoples' lives and territories, with significant and direct impacts leading to a strong presumption of the requirement for consent.[32] The free, prior and informed consent of indigenous peoples should, above all, be obtained in the context of developments that impact on their lands, territories and related resources.

35. A good approach recognizes that the standard of free, prior and informed consent is required, and is not merely an objective, for any project affecting indigenous peoples' lands, territories or other resources and that the standard of consultation applies instead to matters of policymaking and legislative measures that would not directly impact indigenous peoples' property rights. Put simply, indigenous peoples' consent is required in all matters that impact the lands, territories and resources they have traditionally owned, occupied, used or otherwise acquired. In policymaking and matters that do not directly impact their lands, territories and resources, indigenous peoples still have the right to be consulted.

36. Approval for development activities on or affecting indigenous peoples' lands, territories and natural resources without the free, prior and informed consent of the

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[29] Ibid., para. 8.

[30] For a discussion on the standards of consultation and free, prior and informed consent, see the report of Special Rapporteur James Anaya, A/HRC/21/47.

[31] Ibid., para. 51.

[32] See Report of Special Rapporteur James Anaya, A/HRC/12/34, para. 47 (referenced by J. Gilbert and C. Doyle, in "A new dawn over the land: shedding light on collective ownership and consent" in *Reflections on the UN Declaration on the rights of indigenous peoples* (2011).

community in question is likely to cause conflict and to jeopardize the potential for development and poverty alleviation.

37. The Permanent Forum has addressed the issue of free, prior and informed consent in numerous reports and workshops.[33] The Special Rapporteur on the rights of indigenous peoples has also elaborated on the meaning of free, prior and informed consent, and has devoted significant time and effort to provide clarification and orientation on the matter.[34]

38. Reviews commissioned by the World Bank, most notably the Extractive Industries Review,[35] have also considered the standard of free, prior and informed consent and recommended the incorporation of such consent into Bank policy and practice, with special reference to indigenous peoples.[36] The Extractive Industries Review (established in 2001 as a response to criticism from civil society regarding the Bank's involvement in extractive industries) has paid attention to the particular vulnerability of indigenous peoples and has raised concerns over the negative impact of extractive industries on indigenous peoples and local communities.

39. The Extractive Industries Review emphasized that for indigenous peoples, poverty alleviation and sustainable development may have additional or nuanced interpretations and requirements and must include effective guarantees for territorial rights and self-determination.[37] Following this, the Review concluded that the World Bank should incorporate free, prior and informed consent into its safeguard policies and project-related instruments; ensure that its clients and borrowers engage in processes of consent with indigenous peoples directly affected by extractive industries projects and not support those projects that do not support the prior recognition of and effective guarantees of indigenous peoples' right to own, control and manage their lands, territories, and resources.[38]

40. When affected indigenous peoples and their communities have been denied the right to participate, influence and share control over development initiatives and decisions, the result has often been ongoing conflicts that have been detrimental to all stakeholder interests.[39] The Extractives Industries Review concluded that "indigenous peoples ... have the right to participate in decision-making and give their free, prior and informed consent throughout each phase of the project cycle".[40] The Review further states that "this consent should be seen as the principal

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[33] See the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, available from http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops.aspx.

[34] See the Reports of Special Rapporteur James Anaya, A/HRC/21/47 and A/66/288 (including special studies on the Declaration, the State duty to consult with and obtain indigenous peoples' consent before adopting measures that affect them; corporate responsibility to respect the rights of indigenous peoples, and issues relating to extractive industries).

[35] See World Bank Extractive Industries Review: Striking a Better Balance, vol. I (2003).

[36] The World Commission on Dams, a second notable review commissioned by the Bank, also made detailed recommendations in relation to free, prior and informed consent. (See *Dams and Development: A New Framework for Decision-making: The report of the World Commission on Dams*) (United Kingdom and United States of America, Earthscan Publications, 2000).

[37] See World Bank Extractive Industries Review: Striking a Better Balance, vol. I, p. 4.

[38] Ibid., Conclusions and recommendations.

[39] Ibid., p. 18.

[40] Ibid., p. 19.

determinant of whether there is a 'social licence to operate' and hence is a major tool for deciding whether to support an operation".[40]

41. Free, prior and informed consent is particularly crucial in the case of possible resettlement of indigenous peoples. For indigenous peoples, involuntary resettlement can be disastrous, severing their relationships with their ancestral lands. Under no circumstances should indigenous peoples be resettled without their free, prior and informed consent.

42. Presently, the Indigenous Peoples Policy does not require free, prior and informed consent as a precondition for financing of activities on or involving indigenous peoples' lands, territories or resources. Instead, the Policy utilizes a standard of free, prior, and informed consultation resulting in broad community support.[41] The debate around the interpretation of the current Indigenous Peoples Policy standard of free, prior and informed consultation resulting in broad community support versus free, prior and informed consent has, to a large degree, focused on the differences in these standards. In practice, implementation of the current Indigenous Peoples Policy has failed when it has solely relied on the requirement of consultation, leaving behind the requirement of resulting in broad community support.

43. In projects that trigger the Indigenous Peoples Policy, the focus has been on consultation and not on achieving broad community support. A 2011 review of the implementation of the Indigenous Peoples Policy (considering 132 cases that triggered the Indigenous Peoples Policy during the years from 2006 to 2009)[42] confirms this issue and reports that in terms of policy compliance by criterion, consultation scored relatively high but evidence of broad community support scored low.[43] Overall, the review did not find clear and well-documented examples of broad community support (noting also that such support was difficult to measure with the information at hand).[44]

44. The implementation review also noted that since the current Indigenous Peoples Policy (OP 4.10) came into effect in July 2005, important new policy instruments on indigenous peoples, including the principle of free, prior and informed consent, have been adopted at the international level, and several international financial institutions have adopted policies on indigenous peoples that require such consent.[45] At the time of writing, all multilateral development banks (aside from the African Development Bank) have adopted the standard of free, prior and informed consent. The International Finance Corporation (the private sector arm of the World Bank) adopted the standard in 2011. The World Bank is the last to hold out on this procedural right.

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[41] As a comparison, the Indigenous Peoples Policy (para. 19) does require indigenous peoples' prior agreement in the singular situation of projects involving commercial development of their cultural resources. This is not, however, required for any other type of development.

[42] The 132 projects that triggered the Indigenous Peoples Policy OP 4.10 during the fiscal years 2006-2009 were equivalent to about 12 per cent of the total number of all projects approved by the World Bank during the same period. (Operations Policy and Country Services Working Paper, Executive Summary, p. vi).

[43] Operations Policy and Country Services Working Paper, para. 45.

[44] Ibid., para. 50.

[45] Ibid., annex 9.

45. Considering the developments concerning indigenous peoples' rights within the international human rights system, including the principle of free, prior and informed consent, and the fact that the majority of multilateral development banks have already adopted the standard of such consent, the World Bank is strongly encouraged to adopt, in its updated Indigenous Peoples Policy, the standard of free, prior and informed consent, so as to avoid instances of non-compliance as well as the focus on consultation and not community support. An updated Indigenous Peoples Policy should also provide for mechanisms that allow indigenous peoples to dispute situations where free, prior and informed consent has not been adequately respected, recognized and utilized.

46. The author sees that the goal of the World Bank's revision and update of its safeguard policies should be to better respond to indigenous peoples' rights, conditions, needs and resources. There can be no economic interest in weakening indigenous peoples' conditions to exercise their livelihoods. Implementing the articles of the Declaration that specifically guarantee free, prior and informed consent will enhance the Bank's goal and ensure that it has information on emerging issues relating to indigenous peoples' rights and hence can contribute to solutions in situations of conflicting interests.

47. Free, prior and informed consent is increasingly being incorporated into development-related policies and standards and should be considered a fundamental component of development effectiveness in much the same way that consultation and participation are considered fundamental to development effectiveness.[46] As a crucial safeguard means to protect indigenous peoples' internationally recognized rights, the standard of free, prior and informed consent should be incorporated into the World Bank's core objectives and mainstreamed into its operations. The Bank should respect the standard of free, prior and informed consent both in terms of its operational policies and its relations with borrowing countries and clients.

V. Participation of indigenous peoples

48. The Declaration establishes direct participation as a crucial standard that affirms indigenous peoples' right to participate in decision-making in matters that would affect their rights (article 18) and the right to be actively involved in developing and determining social and economic programmes affecting them (article 23). Indigenous peoples' participation is of critical importance to development effectiveness and good governance. According to the Special Rapporteur on the rights of indigenous peoples, the problems arising from development projects affecting indigenous peoples are often related to the absence of adequate mechanisms of participation in project design and implementation and development benefits.[47]

[46] F. MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, p. 40, available from www.forestpeoples.org/sites/fpp/files/publication/2010/10/eiripsfpicjun04eng.pdf.

[47] See Report of Special Rapporteur James Anaya, A/65/264.

A. Participation in policy development

49. There has been a welcome change in the World Bank's increased engagement with indigenous peoples in recent years. The Bank has engaged with indigenous peoples through policy reviews, sector reviews, dialogues and meetings. In 2010, the Bank initiated the High-level Dialogue with Indigenous Peoples to discuss how to improve engagement and collaboration with indigenous peoples. Within some Bank policy boards, including the Participants Committee of the Forest Carbon Partnership Facility, observer positions have been established for indigenous peoples. The Bank also held consultations with indigenous peoples during the revision of the Indigenous Peoples Policy between 1998 and 2005 and, to a limited extent, during the Involuntary Resettlement Policy review (2001) and the review of the Forests Strategy and Forest Policy (2002).

50. While these developments are encouraging, there are some concerns with regard to the World Bank's engagement with indigenous peoples. One issue is that consultation processes have not been structured to allow for their effective participation. During the development of the current Indigenous Peoples Policy, concerns regarding the process and effectiveness of meetings and consultations were raised. Some individuals pointed out that the Bank had not publicized consultation meetings broadly and sufficiently in advance; nor had the Bank allocated sufficient time for the meetings or disseminated documents in advance. Dissatisfaction was also expressed over what was considered poor moderation and translation facilities.[48] Consultation processes have relied and continue to rely heavily upon online and electronic consultation methods rather than in-person meetings.[49]

51. As the World Bank's safeguards review is already under way, it is urged to ensure that the ongoing consultations will be accessible by indigenous peoples on a wide scale and that their contributions are reflected in the final outcomes. More importantly, the Bank must ensure that procedural and substantive means are instituted to ensure that indigenous peoples have the right to participate in decision-making concerning all matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures, as affirmed by article 18 of the Declaration.

B. Participation in project-related activities

52. Effective participation of indigenous peoples in World Bank activities requires integration of their participation at all stages, including design, implementation, compliance and benefits. When indigenous peoples' lands, territories and resources are impacted by a proposed project, their free, prior and informed consent must be sought. Hence, in such instances, it is not a matter of consultation or mere

[48] See Forest Peoples Programme, Indigenous Peoples and the World Bank: experiences with participation (July 2005) pp. 4-8.

[49] See World Bank Consultations with Civil Society: A Sourcebook (February 2007) pp. 4 and 34, available from http://siteresources.worldbank.org/CSO/Resources/ConsultationsSourcebook_Feb2007.pdf. The 2012 review of the Bank's Investment Lending Reform relied primarily on online consultations; the few in-person consultations held were poorly attended. See all Participant lists, available from http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:23206064~printPK:4365~pagePK:41367~piPK:51533~theSitePK:40941,00.html.

participation of the indigenous peoples, but a fully free, informed and consensual participation in a project that has been accepted, through the process of free, prior and informed consent, by the affected community. Considering indigenous peoples' participation in bank-financed projects, free, prior and informed consent should be the required guiding principle in the projects that affect indigenous peoples' lands, territories and related resources.

53. In terms of design, the Indigenous Peoples Policy requires or encourages consultation with indigenous peoples or affected communities by borrowing countries in the preparation of various project assessments and plans (see paras. 6-9 of the Policy) and there are to be opportunities for consultation at each stage of project preparation and implementation (see para. 10).

54. Provisions for indigenous peoples' participation in the implementation of World Bank-financed projects are found primarily in carbon finance projects. The Indigenous Peoples Policy, for instance, provides for indigenous peoples' participation in implementation of parks and protected areas management plans (see para. 21). Similarly, provisions for indigenous peoples' direct participation in compliance activities are generally focused on conservation projects and resettlement plans. In addition, affected indigenous communities participate in compliance through the Inspection Panel and project-specific grievance mechanisms (see annex B, para. 2).

55. Indigenous peoples' participation in project benefits is encouraged in several provisions of the Indigenous Peoples Policy (see paras. 12, 18 and 19). It is important to note that the Bank does finance projects that are specifically earmarked for indigenous peoples as well as capacity-building around climate investment programmes.[50]

56. Based on the Inspection Panel's experience, in some instances, World Bank projects have not identified indigenous peoples as rights-holders. This means that project designs have not identified indigenous peoples and the implications for their rights. The need for better screening in order to determine whether the Indigenous Peoples Policy should be triggered has been identified by both implementation reviews[51] and the Inspection Panel. A recurring theme in Inspection Panel cases relates to findings on when the Indigenous Peoples Policy is applied. A prominent example is a Bank forestry project in the Democratic Republic of the Congo, which did not identify indigenous peoples as an affected community and therefore the Indigenous Peoples Policy was never triggered.[52]

57. The Inspection Panel, however, also noted some important and positive steps by World Bank Management which, during the course of the Panel Investigation, established a protocol of consultations and hired an anthropologist to implement it. A key objective was to strengthen information disclosure to and the participation of affected indigenous peoples in the process for reviewing logging concession rights. While these results and the process were ultimately not considered to be adequate

[50] See World Bank, Funding to Indigenous Peoples Organizations, available from http://go.worldbank.org/TMBIL1E8V0 (last visited 15 Oct. 2012).

[51] See Operations Policy and Country Services Working Paper, para. 40.

[52] See Inspection Panel Investigation Report: Democratic Republic of the Congo Transitional Support for Economic Recovery (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC) (2007), pp. xv-xvii.

by the affected indigenous peoples, it was recognized that this was a good practice that should be maintained and improved.

58. The Inspection Panel Investigation report also highlighted the importance of carrying out a suitable social assessment and preparing and implementing a policy-consistent indigenous peoples development plan, with full participation of the affected indigenous communities, to identify and protect the rights and interests of these communities.

59. While this case highlights serious concerns with non-compliance, it also brings to light some good practices and experiences (such as participatory mapping and the importance of World Bank engagement) which Bank Management can draw from and build upon in future projects. The Bank is encouraged to conduct an independent evaluation of the implementation of the Indigenous Peoples Policy to include case studies (such as the indigenous peoples in the Democratic Republic of the Congo and the Naso and Ngäbe indigenous peoples of Panama). This will contribute to identifying the lessons and gaps that should be taken into consideration in the substantive, comprehensive review and update of the Indigenous Peoples Policy.

60. A related concern is that information is often not disclosed in a manner that is accessible to indigenous peoples. Inaccessible information has been cited in several Inspection Panel cases, while a study of projects affecting indigenous peoples found that only one fourth showed evidence of culturally or linguistically appropriate disclosure.[53] Disaggregated information on social and environmental impacts of projects and the matter of compliance is seldom gathered or reported.[54] Lack of accessible information about the existence of the Inspection Panel has also been found to hinder its effectiveness as a recourse mechanism for indigenous communities.[55]

61. The scope of indigenous peoples' participation and consultation is often limited and late. In many cases, indigenous peoples are not consulted from the ground up on the design and approval of a project itself, as well as the assessment of impacts or plan for mitigation.[56] Consultation processes have been criticized as being ill-suited to indigenous peoples. While the Indigenous Peoples Policy provides that consultation methods relating to projects should be appropriate to the social and cultural values of the affected indigenous peoples (see para. 9 of the Policy), it does not make clear that they should be involved in establishing the

[53] See Inspection Panel Investigation Report, Ghana: West African Gas Pipeline Project (IDA Guarantee No. B-006-0-GH) pp. 65-66 (2008); Inspection Panel Investigation Report: Independent State of Papua New Guinea: Smallholder Agriculture Development Project (IDA Credit No. 4374-PNG) p. 151; and Inspection Panel Investigation Report: Democratic Republic of the Congo Transitional Support for Economic Recovery (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC) p. xxv.

[54] See Operations Policy and Country Services Working Paper, para. 51 (noting that while it is standard practice to have a monitoring and evaluation system for all Bank-financed projects, very few projects include monitoring indicators specifically geared towards indigenous peoples or disaggregated by ethnicity or social/political group).

[55] World Bank, *Accountability at the World Bank: Inspection Panel at 15 Years* (Washington, D.C., 2009) pp. 15, 48, 56 and 57.

[56] The Indigenous Peoples Policy does not clearly require indigenous peoples' participation in the conceptual phase of a project.

appropriate process of consultation. Further, any consultation process must respect indigenous peoples' right to self-determination, representative institutions and decision-making processes, as set out in articles 3 and 18 of the Declaration. It is also of serious concern that the Inspection Panel has also found consultations in some instances to be impeded by intimidation.[57]

VI. Conclusion and recommendations

62. The World Bank's efforts to review and update its procedures and standards with respect to indigenous peoples' rights is a welcome part of the global public and private efforts to consider human rights in economic development activities. A dialogue with United Nations mechanisms with specific mandates concerning the rights of indigenous peoples is necessary. The sessions of the Permanent Forum on Indigenous Issues, which bring together indigenous peoples from all over the world, States, United Nations organizations and specialized agencies, provide a unique opportunity to take the Bank's review process to the next level.

63. The World Bank's ongoing policy review process presents a unique opportunity to positively align the Bank's policies and practice with respecting, recognizing and promoting the human rights of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples provides a constructive framework for the Bank to elaborate further on the minimum standards necessary for safeguarding indigenous peoples' human rights in the context of its overall objectives. The Declaration should guide the Bank's review of all safeguard policies that directly and indirectly impact indigenous peoples as well as their rights, lives, lands, territories and resources.

Recommendations

64. The World Bank is urged to develop its policies and procedures in a fashion that fully recognizes and respects the individual and collective rights of indigenous peoples.

65. The Bank should maintain legal recognition of indigenous peoples' collective ownership to their lands, territories and natural resources, including the lands that have been acquired by means other than traditional or customary occupation or use. Further, the Bank should promote adequate measures of benefit-sharing with indigenous peoples that are consistent with their property rights.

66. The Bank should incorporate free, prior and informed consent in its safeguard policies and project-related instruments. It should also ensure that its clients and borrowers engage in processes of consent with indigenous peoples that are directly affected by the Bank-financed projects and further, should not support those projects that do not support indigenous peoples' rights to own, control and manage their lands, territories and resources.

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[57] See World Bank, *Accountability at the World Bank: The Inspection Panel 10 Years On* (Washington, D.C., 2003), pp. 23, 24 and 75 (discussing human rights violations associated with the Chad Pipeline Project).